United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7046

IN THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

CANADIAN JAVELIN, LIMITED,
JOHN C. DOYLE,
WILLIAM W. WISMER,

Defendants-Appellees,

SAMUEL H. SLOAN

Applicant for Intervention-Appellant

Appeal from the United States District Court
for the Southern District of New York

ANSWERING BRIEF OF THE SECURITIES
AND EXCHANGE COMMISSION, APPELLEE

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I N D E X

CITATIONS

Cases:

Page

Cases (continued):

Page

Cases (continued):

Statutes and Rules:

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APPEALS FOR THE SECOND CIRCUIT

No. 75-7[illegible]

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ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly determined that the appellant should not be permitted to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure in order to assert a money damage claim against the defendants in an injunctive action brought by the

Securities and Exchange Commission where the denial of intervention could not prejudice the appellant's right to assert his claim in a separate lawsuit.

2. Whether the district court's denial of permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure was an abuse of discretion where the district court determined that such intervention "would prejudice the rights of the parties and the public by upsetting a carefully negotiated settlement . . ."

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the district court, dated October 29, 1974, denying the appellant's application to intervene in this Securities and Exchange Commission enforcement action for the purpose of obtaining an order vacating final judgments entered against the three defendants by their consent on July 17, 1974, and

requiring that the parties proceed to trial.[1/] In denying intervention as of right, the district judge determined that Mr. Sloan's interest in ultimately obtaining relief as an allegedly defrauded short seller of Canadian Javelin securities would be "neither impaired nor impeded by

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1/ Rule 24(a) of the Federal Rules of Civil Procedure sets forth circumstances in which intervention must be permitted as of right:

"(a) . . . Upon timely application anyone shall be permitted to intervene in an action: . . . ..(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(b) provides guidelines for permissive intervention:

"(b). . . Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order, administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In the same opinion of October 29, 1974, the district judge denied the appellant's motion for discovery of the depositions of defendants Doyle and Wismer. Judge MacMahon noted that it "appear[ed] that Wismer was never deposed and that Doyle's deposition, taken in Newfoundland, was never transcribed and [had] never been received by the SEC" and concluded that "the transcripts sought do not exist, are not available to the S.E.C., and cannot be produced." (Appendix to Briefs, p. 127)(hereinafter App.____). Review of that ruling is also sought by the appellant. Subsequently, Doyle's deposition was received by the Commission and is currently the subject of a Freedom of Information Act request by Mr. Sloan.

denying intervention and allowing the consent judgments to stand" (App. 124).[2/] In denying permissive intervention the district judge determined that Mr. Sloan's intervention would "prejudice the rights of the parties and the public by upsetting a carefully negotiated settlement" and that Mr. Sloan's "interest in participating in this action at [that] stage [did] not justify intervention" (App. 124). In support of these determinations the district judge relied upon this Court's recent holding that intervention as of right by victims of alleged securities frauds in Commission enforcement actions is inappropriate. Securities and Exchange Commission v. Everest Management Corp., 475 F.2d 1236 (C.A. 2, 1972) (App. 124).

The Commission instituted this civil injunctive action against Canadian Javelin, Limited ("CJL"), John C. Doyle, Chairman of CJL's Executive Committee, and William A. Wismer, the company's president on November 29, 1973. The complaint charged violations of Sections 5 (registration requirements) and 17(a) (anti-fraud provision) of the Securities Act of 1933, 15 U.S.C. 78e and 78l(a); violations of Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b) and

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2/ When the district court denied the motion to intervene in this action, Mr. Sloan's private action for damages against Canadian Javelin and forty-seven other defendants was already in progress. Samuel E. Sloan v. Canadian Javelin, Ltd., et al., S.D.N.Y., 73 Civil 3801 (DBB), 73 Civil 4403 (DBB). On May 30, 1974, Judge Bonsal had denied a motion to consolidate those cases with the instant enforcement action. At the same time Judge Bonsal had dismissed Mr. Sloan's complaints in those actions leaving him free to file a new complaint against Canadian Javelin, John Doyle and William Wismer. Those decisions of Judge Bonsal have been appealed to this Court. Nos. 74-8252, 74-8253.

Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5 (antifraud provisions); and violations of the annual and periodic reporting requirements contained in Section 13(a) of the Securities Exchange Act, 15 U.S.C. 78m(a). (App. 3-23).[3/] In addition to injunctions against further violations, the Commission's complaint sought certain ancillary relief, including the appointment of a special receiver, a mandatory injunction requiring CJL to correct and amend its annual and periodic reports on file with the Commission and a mandatory order requiring that defendant Doyle report to the district court and the Commission on a periodic basis all his transactions in the securities of CJL and its affiliates. (App. 22-23).

After extensive negotiation between the parties, the action was settled as to all defendants. Without admitting or denying the allegations of the complaint, CJL (App. 59-69) and John C. Doyle (App. 52-58) consented to the entry of judgments permanently enjoining them from violations of the registration, antifraud and reporting provisions of the federal securities laws in connection with CJL securities; William Wismer stipulated, subject to the contempt powers of the court, that he would not violate the registration, antifraud, or reporting requirements of the

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3/ The Complaint charged that the company had disseminated a series of press releases between June and September 1973, which contained false and misleading statements relating to its purported development of Panamanian mineral properties. The allegedly fraudulent statements concerned the commercial feasibility of the project, the prospects for financing it and the status of negotiations with the Panamanian government for exploitation concessions (App. 10-14). It was further charged, among other things, that the Company's financial condition had been misrepresented in filings with the Commission by the inclusion as a current asset of a $4.3 million claim against the Government of Newfoundland and Labrador that was not recognized by that government.

federal securities laws in connection with CJL securities (App. 47-51). In addition, the judgment entered against the company contained a number of other provisions designed to ensure compliance with federal securities statutes. Among other things, the judgment provided that the company must have outside directors constituting forty per cent of its board and that they must be independent and subject to certain criteria satisfactory to the Commission (App. 63-64); the company was also required to establish a standing compliance committee, a majority of which would consist of independent members of the board of directors, to pass upon all information to be disseminated to the public (App. 64-65); and in addition the company was required to appoint a special counsel subject to the Commission's approval. The special counsel was authorized to take all reasonable steps to secure CJL's compliance with the federal securities laws and to make such inquiries as he deemed necessary to insure that the district court's judgment was being carried out. (App. 65-67). CJL was required by the judgment entered against it to file within 60 days or at such other time as the Commission may allow, all required filings which had not been made previously and all amendments and supplements to its present filings as required by law. 4/

4/ The Company did not mail its annual report to shareholders for the year ending December 21, 1973, until August, 1974. Its quarterly reports required to be filed with the Commission on Form 10-Q for the periods ending March 31, 1974, June 30, 1974, and September 30, 1974, were not filed with the Commission until December 12, 1974. (Securities Exchange Act Release No. 11172, January 9, 1975, p. 2). On December 16, 1974, CJL sent a report to its shareholders as to present status of the company's affairs and distributed it to the public. (Id., p.2).

The orders entered against Doyle and Wismer prohibited them from disseminating information to the public without prior approval of the standing compliance committee and required that they report their transactions in CJL Securities to the Commission on a periodic basis (App. 50, 56).

On July 22, 1974, five days after the rendition of final judgment as to all three defendants named in the Commission's complaint, Mr. Sloan gave notice of his motion to intervene.[5/]

5/ While Mr. Sloan's Notice of Motion, dated July 22, 1974 (App. 72) makes no reference to the suspension of trading in CJL's common stock which accompanied the Commission's enforcement action against the company, his affidavit in support thereof stated that the district court "should permit trading in Canadian Javelin, Ltd. to resume immediately" (App. 76). Presumably Mr. Sloan hoped to obtain that result if he were permitted to intervene and participate as a party. In his opinion denying intervention which is appealed here, the district judge held: "Ordering such a resumption of trading is not within our power in this case, as Sloan himself seems to realize, since he has recently brought an action against the SEC. (Sloan v. S.E.C., 74 Civ. 2792) seeking to have the SEC's suspension power declared unconstitutional." (App. 126). The action referred to was dismissed by Judge Griesa on February 14, 1975, and is presently on appeal before this Court, No. 75-7283. In addition to that action and the instant one, Mr. Sloan has challenged the Commission's suspension of trading in CJL in a petition for review in this Court, No. 74-2457. The petition for review has been briefed and is now awaiting argument.

ARGUMENT

I. APPELLANT WAS PROPERLY DENIED INTERVENTION IN THE COMMISSION'S CONCLUDED ACTION FOR AN INJUNCTION.

The appellant has sought unsuccessfully to intervene below in an enforcement action brought by the Commission to obtain injunctive and other relief to curtail violations of the federal securities laws. Appellant's attempted intervention came after the consummation of a carefully negotiated settlement between the Commission and the defendants and after the entry of judgments against all three defendants. Despite the fact that the Commission was able to obtain by consent substantially the same relief it could have secured after a protracted trial, the appellant would have these consent judgments set aside, require the parties to proceed to trial, and enter the suit himself to assert a claim for damages against the defendants. The district judge saw "nothing to be gained by the court, parties, public or anyone else, except Sloan, from such a trial, however, since the consent judgments have, for all intents and purposes, terminated this action." (App. 126-127.)

A. Appellant Is Not Entitled to Intervention as a Matter of Right in the Commission's Injunctive Action.

The appellant is free to assert his claim against the defendants in a separate action for damages and, indeed, he has done so. (See n.2, p.4, supra.) As the distsrict court noted, the consent judgments obtained in this action "will have neither res judicata, collateral estoppel, nor

stare decisis effects on Sloan's own action against these defendants," citing this Court's opinion in Securities and Exchange Commission v. Everest Management Corp., supra, 475 F. 2d at 1239) (App. 123).[6/]

An applicant for non-statutory intervention as of right under Rule 24(a) must show ". . . an interest relating to the property or transaction which is the subject of the action and . . . that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." But, except for his insubstantial contention that he seeks to protect shareholders of CJL from what he contends is a disadvantageous consent decree entered into by its management,[7/] which the court below found not to be his "real interest" (App. 123), his objective is

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6/ That decision is in accord with other recent cases, cf. Ionian Shipping Co. v. British Law Insurance Co. Ltd., 462 F. 2d 531 (C.A. 2, 1970); Babcock & Wilcox Co. v. Parsons Corporation, 430 F. 2d 531 (C.A. 8, 1970).

7/ This contention is inconsistent with Mr. Sloan's assertion (Appellant's Brief pp. 52-53) (Br. 52-53) that "THE INJUNCTION IS NOT LEGALLY BINDING ON [CJL]." Moreover, his revolutionary suggestion that his interest in the affairs of CJL as a stockholder gave him a right under Rule 24(a)(2) to intervene on the ground that the corporation was not adequately defending itself (Br. 23) strikes at the essence of corporate democracy. In re Standard Power & Light Corporation (cited by appellant as In re Securities and Exchange Commission), 48 F. Supp. 716 (D. Del., 1943), involved a reorganization under Sections 11(b) and 11(d) of the Public Utility Holding Company Act, where the right of classes of stockholders conflicted so that the corporation could not be deemed adequately to represent each class. Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434 (1940), also cited by appellant, holding that this Commission was properly permitted to intervene to prevent a reorganization under Chapter XI of the Bankruptcy Act of a corporation which should have proceeded under Chapter X, is wholly irrelevant to appellant's contention.

that he "be spared some of the financial burden he would be required to bear in prosecuting his own action" and that he "be able to make use at trial of evidence which the S.E.C. has developed in the course of its own investigation of [CJL]" (Br. 21-22). As this Court held in Securities and Exchange Commission v. Everest Management Corp., supra at 1239, where these very considerations were urged:

> "This is not the sort of adverse practical effect contemplated by Rule 24(a)(2)."

So far as we are aware, no case has held that there may be an intervention as of right in a Commission enforcement action by persons seeking damages.[8/] The Commission can bring the number of enforcement

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8/ Consistent with this Court's decision in Everest Management, cases holding against intervention as of right are found in the analogous antitrust field. Thus, in United States v. Blue Chip Stamps Co., 272 F. Supp. 432, 438 (C.D. Cal., 1967), affirmed (per curiam) sub nom. Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968), where the movants for intervention sought money damages while the government sought an injunction against defendants' antitrust violations, it was held:

> "The speculation that petitioners may be benefited in the trial of their respective cases if the Government is forced to litigate its case certainly does not give them an 'interest' in the Government's case sufficient to support the motion to intervene."

And in United States v. Atlantic Richfield Company, 50 F.R.D. 369, 371 (S.D. N.Y., 1970), affirmed sub nom., Bartlett v. United States, 401 U.S. 986 (1971), it was held that:

> ". . . even if the claim for damages were based upon precisely the same conduct challenged by the government, movants would still not be entitled to intervene as of right."

See, also, United States v. CIBA Corporation, 50 F.R.D. 507 (S.D. N.Y., 1970).

actions it does only because in all but a small proportion of those cases remedial relief is obtained by consent decrees. If it should be held that persons asserting claims for damages arising out of the facts alleged in causes of action set forth in the Commission's injunctive cases could intervene as of right and, as appellant seeks to do, could overturn consent decrees, the Commission's enforcement program would necessarily be severely curtailed.[9/]

9/ Appellant broadly attacks the Commission's practice of obtaining consent decrees in general, as well as the consent order obtained in the instant case (see, generally, Br. 31-53). This Court presumably approved that practice in Securities and Exchange Commission v. Everest Management Corp., supra at 1240, in recognizing the efficacy of consent decrees in the enforcement of the federal securities laws by the Commission. In this connection, the court below noted (App. 125):

> "Congress has entrusted the SEC with the responsibility for protecting the public interest. The SEC has ably discharged that responsibility here by obtaining essentially all the relief originally sought in the complaint. If we were to allow a private party to vacate such a decree on the flimsy bases put forth here by Sloan, consent decrees might be discouraged and the work of the SEC impeded."

B. The District Court Did Not Abuse Its Discretion in Denying Permissive Intervention under Rule 24(b).

"Rule 24(b) necessarily vests broad discretion in the district court to determine the fairest and most efficient method of handling a case with multiple parties and claims." Securities and Exchange Commission v. Everest Management Corp., supra at 1240. This Court there noted that "there is not a single reported case in which an appellate court has reversed solely because of an abuse of discretion in denying permissive intervention. 7A Wright and Miller, Federal Practice and Procedure, Section 1923 at 631-32 (1972)."

Where, as here, the Commission has already obtained final injunctive and other relief against all defendants when intervention is sought, the delay and prejudice to the original parties which would be occasioned by the private litigant's intervention are self-evident. Apart from the disadvantage in disturbing final judgments restraining violations of the federal securities laws, numerous factors weigh against the prosecution of a private action for damages within a Commission enforcement action. Here, as in Securities and Exchange Commission v. Everest Management Corp., supra at 1240, "the complicating effect of the additional issues and parties outweighs any advantage of a single disposition of the common issues." The rationale of that decision was reaffirmed in Securities and Exchange Commission v. General Host Corp., 508 F. 2d 1332 (C.A. 2, 1975).

The potentially complicating elements which would be introduced by the litigation of a private cause of action such as Sloan's are numerous. In a suit for monetary damages, elements must be established which are unnecessary in a Commission suit for equitable or prophylactic relief. Thus, the Commission is not required to show actual injury to investors,[10/] while a private damage plaintiff would have to show some causal nexus between the violative conduct and his alleged injury.[11/] While negligence alone may be sufficient for the Commission to obtain injunctive relief,[12/] something more may be required in a private action.[13/] The Commission's suit for injunctive and ancillary relief is equitable in nature and, hence, not triable by jury,[14/] but if an action for damages were asserted

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10/ Securities and Exchange Commission v. Capital Gains Research Bureau, 375 U.S. 180, 192 (1963).

11/ Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972); Chasins v. Smith, Barney & Co., 438 F.2d 1167, 1172 (C.A. 2, 1970); Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 797 (C.A. 2, 1969), certiorari denied, 400 U.S. 822 (1970).

12/ Securities and Exchange Commission v. Management Dynamics, 515 F. 2d 801 (C.A. 2, 1975); Securities and Exchange Commission v. Spectrum, Ltd., 489 F.2d 535 (C.A. 2, 1974); Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 (C.A. 2, 1972); Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833, 868 (C.A. 2, 1968) (en banc), certiorari denied sub nom., Kline v. Securities and Exchange Commission, 394 U.S. 976 (1969)

13/ Technology Fund, Inc. v. Lionel Corp., 483 F.2d 540, 541 (C.A. 2, 1973), certiorari denied, 415 U.S. 918 (1974); Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 363 (C.A. 2, 1973), certiorari denied, 414 U.S. 910 (1974); Lanza v. Drexel & Co., 479 F.2d 1277, 1306 (C.A. 2, 1973); Shemtob v. Shearson, Hammill & Co., 448 F.2d 442, 445 (C.A. 2, 1971).

14/ Porter v. Warner Holding Co., 328 U.S. 395 (1946); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Rachal v. Hill, 435 F.2d 59 (C.A. 5, 1970), certiorari denied, 403 U.S. 904 (1971); Gefen v. United States, 400 F.2d 476 (C.A. 5,

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In Pernell v. Southall Realty, 416 U.S. 363, 385 (1974) the

defendants would be entitled to a jury trial with respect to those claims.[15] This would occasion a divided trial of the issues and inevitable delay. The assessment of damages in itself could be a complex and time-consuming matter justifying denial of intervention.[16]

The sound public policy determinations made by this Court in the Everest Management and General Host cases and by the court below in this case have been reinforced by Congressional enactment in the Securities Acts Amendments of 1975 of a provision exempting the Commission's enforcement actions from pre-trial consolidation or coordination pursuant to 28 U.S.C. Section 1407.[17]

14/ (continued)
1968), certiorari denied, 393 U.S. 119 (1969); Connolly v. United States, 149 F.2d 666 (C.A. 9, 1945). See generally, 5 Moore's Federal Practice (2d Ed., 1971), §38, 11 [7] at p. 128.2, §38.24 [3] at pp. 190-195 and §38.21 [1] at p. 230.

15/ Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-473 (1962); Rachal v. Hill, supra, 435 F.2d 59; Cannon v. Texas Gulf Sulphur Company, 323 F. Supp. 990 (S.D. N.Y., 1971); Crane Co. v. American Standard, Inc., 326 F. Supp. 766 (S.D. N.Y., 1971); Richland v. Crandall, 259 F. Supp. 274, 278-279 (S.D. N.Y., 1966); III L. Loss, Securities Regulations (2d Ed., 1961) 1851.

16/ Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co., 315 F.2d 564, 567 (C.A. 7), certiorari denied, 375 U.S. 834 (1963).

17/ Subsection (g), added to Section 21 of the Securities Exchange Act, 15 U.S.C. 78u, by Section 17(3) of the Securities Acts Amendments of 1975, provides in pertinent part:

> "(g) Notwithstanding the provisions of section 1407(a) of title 28, United States Code, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be

(continued)

II. SINCE THE APPELLANT HAS NOT BEEN GRANTED LEAVE TO INTERVENE, HIS ARGUMENTS WITH RESPECT TO THE PROPRIETY OF THE INJUNCTIVE RELIEF OBTAINED BY THE COMMISSION IN THIS ACTION ARE NOT PROPERLY BEFORE THIS COURT.

Appellant seeks to present an array of arguments with respect to the propriety of the judgments entered. Among other things, he urges that a consent judgment is unconstitutional, since there is no Article III case or controversy (Br. 31); that the district court failed to comply with certain of the Federal Rules of Civil Procedure (Br. 39, 41); that injunctive relief is not appropriate as to defendant Doyle, since he is a "fugitive from justice" and beyond the control of the court (Br. 44); that the judgments amount to "unconstitutional meddling" in CJL's affairs (Br. 46); and that the injunction against CJL is not legally binding, since CJL is a Canadian corporation (Br. 52). All of these arguments appear to be frivolous. But whatever merit these arguments may have, Mr. Sloan has not been granted leave to intervene, is not entitled to intervention and, accordingly,

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17/ (continued)

> consolidated or coordinated with other actions not brought by the Commission even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission . . ."

As the Senate Committee on Banking, Housing and Urban Affairs noted in discussing the need for adoption of subsection (g):

> "Private plaintiffs seeking only money damages lack the same incentive to hasten pretrial proceedings which the Commission is required to have. The countervailing factors--conservation of work and expense by the courts and the litigants, their counsel, and witnesses--would be well served by combining related private suits whenever appropriate and allowing the Commission's public action to proceed unfettered by them." S. Rep. No. 94-75, 94th Cong., 1st Sess. (1975).

Pernell v Southall Realty, supra affirmed this principle. These

has no standing to raise them. These arguments do, however, dispel any doubt as to the correctness of Judge MacMahon's determination (App. 127) that Mr. Sloan's presence in this action "would unduly delay . . . adjudication of the rights of the original parties.

CONCLUSION

For the foregoing reasons the order of the district court should be affirmed.

Respectfully submitted,

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August 1975

should be condemned by the courts.

SECURITIES AND EXCHANGE COMMISSION
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OFFICE OF THE
GENERAL COUNSEL

August 25, 1975

A. Daniel Fusaro, Esquire
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Re: Securities and Exchange Commission v. Canadian Javelin Ltd. et al.
No. 75-7046

Dear Mr. Fusaro:

Enclosed for filing are twenty-five copies of the Commission's brief as appellee in the captioned action.

I certify that I have served by mail three copies of the Commission's brief upon the appellant, Samuel H. Sloan, at 917 Old Trent's Ferry Road, Lynchburg, Virginia 24503.

Very truly yours,

Thomas L. Taylor III
Attorney